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IN THE

Supreme Court of the United States

October Term, 1969.

No. 578.

ANTONIO CORALLO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY.

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The Government's Memorandum in Opposition to the Petition for a Writ of Certiorari, though a mere two pages long, requires a response. The Memorandum has dark significance for what it contains and what it does not contain.

1. Despite the unwonted brevity of the Government's opposition in an important and complex case, the Government has mangled the facts concerning the status of its prime witness, Herbert Itkin, who maintains that he is an undercover agent for the F.B.I.

The Government asserts—erroneously—that the record shows that Itkin never reported anything about the conspiracy to the F.B.I. until after the last payment had been received and the matter was under investigation by the

State (Gov't Memorandum, p. 2). The record is flatly contrary. The evidence shows that the last payment was received in mid-May of 1967 (259a, 518a-520a). The State investigation began four months later in the Fall of 1967 (444a). Further, the Government's statement ignores the admitted fact that Itkin's work for the F.B.I. began in 1962 (802a). In 1963, the F.B.I. instructed Itkin to infiltrate organized crime as deeply as he could (552a). In May of 1967, the month of the last payment, Itkin informed the F.B.I., *inter alia,* that he had made contact with petitioner and co-defendant Motto (557a). During that month, he asked the F.B.I. to install recording equipment in his house so that he could record conversations that would serve as corroborative evidence of his reports (586a).

Moreover, the evidence indicates that the payment in mid-May of 1967, while the last one received, was not the last one expected by Water Commissioner Marcus and his co-conspirators. A claim for an additional $1600, never paid, lingered through the summer of 1967 into August (527a). Meanwhile, in June and July, Itkin was making more detailed reports to the F.B.I. (555a). The Government does not mention, of course, Itkin's highly plausible explanation for the timing of his reports of infiltration, based upon his assessment of the need to protect his "cover".

Thus, contrary to the assertions of the Government, Itkin was acting throughout on F.B.I. instructions, was reporting to the Government well before any State investigation and before the completion of the payments. Itkin has never varied from his testimony that he was at all times accumulating evidence to be turned over to the F.B.I. and viewed himself as working in his own way for the Government.

2. The Government reasserts its "position" in the Court of Appeals that Itkin was not an undercover agent because he had a personal stake in the venture (Gov't Memorandum, p. 2, n. 2). It is Governmental logic that, because Itkin took some of the kick-back money, he was not an undercover agent. Such reasoning is plainly a non-sequitur. Taking money did not erase Itkin's instructions from the F.B.I. or his overriding purpose of infiltration. He was not instructed to refuse to take his apparent share of the illegal funds, and it is a naive suggestion that he could have maintained his undercover status if he had done so.

The Government's actions—not their words—attest to their treatment of the status of Itkin as an undercover agent. Itkin has not been prosecuted for his "personal stake in the venture". While indicted to preserve his "cover", he was severed on Government motion and the charges are to be *nolle prossed* by the Government.

The Government Memorandum is conveniently silent on Itkin's still pending removal petition in the State case against him arising out of this basic transaction. In Federal court, Itkin asserts that he was a Federal officer in these events. The Government does not disavow his claim. See the Petition for Writ of Certiorari, pages 7-8.

3. The Government claims that the "factual issue" of Itkin's status "was resolved against petitioner both by the trial judge and by the court below on appeal." (Gov't Memorandum, p. 2). Unquestionably, the Court of Appeals made a wholly improper finding of fact on Itkin's status, as set forth in our Petition. Fact-finding is not an appellate court task. It is particularly egregious when, as here, the appellate court finds a "fact" by a wild misconstruction of the record as containing no evidence to the contrary. In the trial court, the judge made no findings of fact. The

Government now at last concedes at least that there is a "factual issue" concerning Itkin's status. Factual issues are tried to the jury. The refusal of the trial court to submit this factual issue under proper instructions to the jury is precisely the second question presented by this Petition.

4. The Government Memorandum's last footnote contends that, since Itkin himself testified, no hearsay objection could be made concerning his extra-judicial statements. The issues surrounding the Government subterfuge here go well beyond a mere hearsay evidence problem. Even so, the pretense that Itkin was a co-conspirator was the device used to introduce not only his own extra-judicial statements but also numerous harmful statements attributed to co-defendants Rappaport and Motto, who never took the witness stand and who could not be examined.

The Government's extremely brief Memorandum in Opposition, larded as it is with factual, logical and legal error, bespeaks the gross incongruity of the Government's position in this Court. They retreat to silence and misstatement. The obvious discomfiture of the Government is no basis for upholding this flawed conviction. Indeed, it underscores the vital need for this Court to exercise its power of review.

We respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner.